Docket No. 05-35264

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND
UNITED STOCKGROWERS OF AMERICA,
Plaintiff/Appellee,

v.

UNTIED STATES DEPARTMENT OF AGRICULTURE,
Animal and Plant Health Inspection Service, *et al.*
Defendants/Appellants.

On Appeal from the United States District Court for the District of Montana

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AMICUS CURIAE BRIEF OF PIONEER, INC. SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae Pioneer, Inc. ("Pioneer") states that it has no parent corporation and that no publicly held corporation owns 10% or more of Pioneer's stock.

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I. STATEMENT OF *AMICUS CURIAE*.[1]

Pioneer is a farm-family owned custom feedlot operation which takes in, and feeds cattle at its feedlot in western Kansas.

Generally speaking, the cattle industry is a vertical industry which can be categorized into three sectors. In the first sector, ranchers with cow herds graze their calves on ranchland until they reach a weight of 650 pounds per head, more or less. Generally speaking, ranching operations are concentrated in the northern United States and Canada where wide-open ranges and "Big Sky" country is plentiful. Generally speaking, ranchers sell their calves and yearlings through sale barns and livestock exchanges when they reach a weight of 650 pounds per head, more or less depending upon sex, breed, grazing conditions, and general market conditions. This first sector of the cattle industry is the sector in which R-CALF's members are engaged.

The second sector of the cattle industry involves feedlots. This is the sector in which Pioneer is engaged. A feedlot operation may own some of the cattle it feeds, but oftentimes "custom" feeds cattle on a contract basis for feedlot customers commonly referred to as "cattle feeders."

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[1] This brief is similar to the brief Pioneer has tendered in the related appeal filed by the National Meat Association ("NMA"). The issues in the two appeals overlap substantially except NMA's appeal has the added issue of showing the Court's denial of its motion to intervene was in error. In the absence of a consolidation order, this brief is filed to ensure that Pioneer will be heard on the substantive issue of whether the District Court's injunction should be dissolved.

Generally speaking, feedlots and cattle feeders purchase 650 pound "feeder cattle" from ranchers engaged in the first sector of the cattle industry described above. Basically, a feedlot operation is like a "bed and breakfast" for cattle. In a feedlot operation, cattle are confined to pens. While in the feedlot, feeder cattle's "feed rations" consist largely of high protein grains that are delivered by feed trucks to feed bunks, much like how a concrete truck pours a sidewalk or gutter. Generally speaking, feedlot operations are concentrated near feed grain producing regions (such as Nebraska, Colorado, Kansas, and Texas) because it is cheaper to haul "feeder cattle" to the grains than it is to haul the grains to the feeder cattle. This is so because it is cheaper to haul a 650 pound light animal than it is to haul tons of feed that each animal will consume before it is fat and ready for harvest.

Feeder cattle typically "feed" at the feedlot for 150 to 175 days, and will gain approximately 500 pounds to a finished (or fat) weight of approximately 1,150 pounds per head, more or less depending upon sex, breed, and other market conditions. Once the feeder cattle reach "finished" weight, the feedlot and cattle feeders sell the "finished" or "fat" cattle to the meat packers who are involved in the third and final sector of the cattle industry.

Generally speaking, many feedlot operations are family-owned farm operations. Pioneer is a farm-family owned operation. A custom feedlot operation

is hard work. It is a competitive business involving high risk, with modest returns. It is not uncommon for family-farm owned custom feedlot operations to fail.

In the third sector of the cattle industry, the meat packers purchase the finished (or fat) cattle from feedlots, harvest the cattle, and process the carcasses for distribution to wholesalers and retailers.

Appellee Ranchers Cattlemen Action Legal Fund, United Stock Growers of America's ("R-CALF") is a trade association whose members are ranchers. R-CALF and its members' interest is aligned with the first sector described above. R-CALF's members are generally located in "ranching" in wide-open rangeland states like Montana where R-CALF is headquartered and where it brought suit in the court below. The National Meat Association's ("NMA") interest is aligned in the third sector described above. Appellant United States Department of Agriculture ("USDA") represents the macro domestic and foreign policies interests of the United States. None of the parties to this appeal are aligned with, or find themselves in the second sector of the cattle industry in which Pioneer finds itself.

The USDA promulgated the BSE Minimal Risk Regions and Importation of Commodities Final Rule, 70 Fed. Reg. 460 ("Final Rule"). Pioneer relied on the effectiveness of the Final Rule, and planned to purchase Canadian cattle to supply Pioneer's and Pioneer's cattle feeder customers' demand for light cattle. Pioneer expected and relied upon routine implementation of the long-planned Final Rule.

However, Pioneer is now unable to import light Canadian cattle it planned on receiving because the District Court substituted its judgment for the judgment of the Secretary of Agriculture and entered a preliminary injunction at the conclusion of a one-half day hearing. The District Court's order has created volatility, uncertainty, shortages, and high prices in domestic light cattle markets, and has adversely impacted feedlots and cattle feeders, like Pioneer, to the financial benefit to ranchers like R-CALF's members.

The District Court's decision to sweep aside the Secretary of Agriculture's long-planned Final Rule disrupts the planning of family-farm operations in the second sector of the cattle industry. The District Court's decision forces Pioneer and similarly situated feedlots and cattle feeders to pay higher prices for light feeder cattle due to the unavailability of Canadian cattle. Further, because of the competitive disadvantage domestic meat packers face, as described in NMA's Brief, domestic meat packers have put downward pressure on the prices they pay feedlots and cattle feeders for fat cattle. The District Court's order has put a market "squeeze" on feedlots and cattle feeders, and adversely affects family-farm feedlot operations. The "squeeze" is in place because R-CALF's members profit from the high light cattle prices charged to feedlots at the same time packers cannot aggressively pay feedlots for fat cattle because they are competing with

Canadian packers who can harvest cheaper Canadian cattle and ship boxed beef to the United States.

Although this Court has heard the voices of other sectors in the cattle industry, no other party to the case has adequately voiced the interests of Pioneer and similarly situated feedlots and cattle feeders. The rancher's voice is heard through R-CALF. The meat packers' voice is heard through the NMA. Governmental macro domestic and foreign policy issues are voiced by the USDA. However, feedlots and cattle feeders have no similar voice in this appeal even though the District Court's preliminary injunction has severely harmed feedlots and cattle feeders.

Pioneer submits its *Amicus* Brief to inform the Court of the severe hardship the preliminary injunction imposes on domestic feedlots and cattle feeders. Pioneer files its *Amicus* Brief in favor of the outcome the USDA urges.

Pioneer has an interest in this appeal because this Court's decision to affirm or reverse the preliminary injunction will greatly affect Pioneer's business. Failure to implement the Final Rule and reopen the border "squeezes" and causes hardship to domestic feedlots and cattle feeders like Pioneer.

Pioneer has filed its Fed. R. App. P. 29(a) Motion for Leave to File *Amicus Curiae s* Brief contemporaneously with the submission of this *Amicus* Brief.

II. STATEMENT OF FACTS.

A. Introduction.

USDA's Brief states, in passing, that the District Court's injunction enhances the economic position of R-CALF members "while inflicting harm on others". *See Brief of USDA* at P.15. "Others" harmed includes farm-family owned feedlots. Pioneer tenders this brief to explain how that sector is harmed, and how the District Court failed to consider that harm when it substituted it judgment for the Secretary of Agriculture's judgment and issued its injunction.

B. Background.

On May 20, 2003, Bovine Spongiform Encephalopathy ("BSE") infected a cow in Canada. In consequence, on May 29, 2003, the USDA banned importation of live Canadian cattle. However, since August 2003, the USDA has allowed imports of Canadian boneless or "boxed" beef, while continuing the ban on imports of live Canadian cattle.

On November 4, 2003, the USDA commenced a rulemaking process to resume importation of live Canadian cattle into the United States. On January 4, 2005 the Final Rule was published.

On January 4, 2005, R-CALF filed suit in the United States District Court for the District of Montana, Billings Division, Cause No. CV-05-06-BLG-RFC,

seeking to enjoin implementation of the Final Rule and the importation of all live Canadian cattle.

Between January 10, 2005 and March 2, 2005, Pioneer planned and engaged in the cattle business with the expectation that the USDA's proposed Final Rule was reliable and predictable, as they usually should be and are.

On March 2, 2005, the District Court granted R-CALF's application for a preliminary injunction, disrupted family-farm operations' planning for their cattle supplies and pricing, and threw the cattle industry into chaos.

C. Effect of the District Court's Order.

Because of the District Court's decision and the resulting uncertainty and imbalance in the market place, light cattle prices are volatile and high to the advantage of R-CALF's rancher members and to the disadvantage of feedlots and cattle feeders. The District Court's order has caused volatility in the cattle markets and high prices for light cattle because of R-CALF's special interest to limit the supply of light cattle and keep prices high for the members of R-CALF's trade association. R-CALF successfully persuaded the District Court that a long planned Final Rule ought to be casually swept aside to prolong the domestic light cattle shortage and to keep light cattle prices high. High light cattle prices are to the disadvantage of Pioneer and the other feedlots and cattle feeders who purchase light cattle, and who need a steady supply of light cattle.

The catastrophic result of the District Court's decision to the second sector of the cattle industry is avoidable and unnecessary because the Final Rule was lawfully made, and should not be casually swept aside by the District Court. Feedlots, cattle feeders, and the cattle markets must be able to rely on the predictability of the USDA rule-making process in planning and running their businesses. The District Court's issuance of the preliminary injunction should not stand because the District Court misapplied established standards when it casually swept aside the judgment of the Secretary of Agriculture and entered the preliminary injunction. The District Court should have followed established preliminary injunction standards rather than adopting the view of special interests involved in only one sector of the cattle industry and whose profitability often comes at the expense of other sectors of the cattle industry.

III. SUMMARY OF ARGUMENT.

The preliminary injunction should be reversed because the District Court abused its discretion when it failed to properly apply the criteria required to issue a preliminary injunction. In particular, the District Court failed to consider the economic harm the preliminary injunction causes to other sectors of the cattle industry. Instead, the District Court's decision excessively focused on the distinction between very "low" and "zero" risk to human health, while ignoring the interests of feedlots. Further, it now appears that R-CALF has dropped its

contention that the consumption of beef is unsafe regardless of country of origin. *See* R-CALF Answering Brief, Case No. 05-35214, at 44 (9th Cir. March 29, 2005) (R-CALF "never argued that there was great risk to human health from [the] resumed imports").

The District Court failed to show that the USDA's actions in promulgating the Final Rule were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as required by the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A). Additionally, the District Court did not give deference to the Final Rule or give the Final Rule a presumption of validity as required under established legal precedent. Based upon the record, the District Court impermissibly substituted its judgment for the judgment of the Secretary of Agriculture.

Pioneer endorses the outcome requested by USDA's Brief. In addition to the points stated in USDA's Brief, the District Court failed to consider the impact the preliminary injunction would have on all sectors of the domestic cattle industry, including feedlot and cattle feeder sector in which Pioneer is engaged.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ENTERED THE PRELIMINARY INJUNCTION.

A. Standard of Review.

In the Ninth Circuit, preliminary injunction orders will be reversed "only if the District Court abused its discretion, made an error of law, or based its decision

on erroneous legal standard or on clearly erroneous findings of fact." *Textile Unlimited, Inc. v. A..BMHAND Co.*, 240 F.3d 781, 786 (9th Cir. 2001). In this case, for the reasons set forth in the USDA's Opening Brief and for the reasons set forth below, the District Court erred in issuing the preliminary injunction order.

B. Standard for Preliminary Injunction.

To obtain a preliminary injunction a party must show: (1) a substantial likelihood of success on the merits, (2) the possibility of irreparable injury to the Plaintiff/Appellee if injunction relief is not granted, (3) the balance of hardships favoring the Plaintiff/Appellee, and (4) the advancement of the public interest. *See id.; Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). A party may meet its burden by demonstrating "either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that the serious questions are raised and the balance of hardships tips sharply in favor of the moving party." *Stuhlbarg Int'l Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839-40 (9th Cir. 2001).

In balancing the hardships, this Court has held that a District Court committed reversible error when it "failed to identify the harms which a preliminary injunction might cause to defendants and to weigh them against plaintiff's threatened injury." *National Football League,* 634 F.2d at 1203. This Court has instructed:

> Traditional standards for granting a preliminary injunction impose a duty on the court to balance the interests of all parties and weigh the damage to each, mindful of the moving party's burden to show the possibility of irreparable injury to itself and the probability of success on the merits.

Id. The District Court failed to meet that duty here when it failed to consider the interests of feedlots and cattle feeders.

C. The District Court, by Failing to Consider the Impact on All Those in the Cattle Industry Before Issuing the Injunction Committed Reversible Error.

The District Court abused its discretion in failing to consider the harm to other parties in other sectors of the cattle industry. In particular, the District Court did not consider the interests of feedlots and cattle feeders who are harmed by the District Court's preliminary injunction.

The District Court stated during the hearing on the R-CALF's application for a preliminary injunction that it was focused on human health issues rather than the economic interests of those in the cattle industry:

> THE COURT: Well, you know, I know that's one of the considerations under the statute I cited, the economic interests of the livestock and related industries in the United States. I'm focusing primarily [sic] the health and welfare of the people of the United States.

Transcript of Hearing on Application for Preliminary Injunction at P. 80, LL. 10-14. The human health issues on which the District Court focused were overstated and exaggerated. Apparently, even R-CALF disagrees with the District Court and

now concurs that eating beef is safe and should be encouraged regardless of country of origin. *See* R-CALF'S Answering Brief, Case no. 05-35214, at 44 (9th Cir. Mar. 29, 2005).

The District Court inappropriately centered on exaggerated human health issues without fully considering the economic effects upon feedlots and cattle feeders like Pioneer. In effect, the court re-wrote the test for injunctive relief, and ignored the balance of interests test. Rather, the District Court overweighed focus on exaggerated human health issues (i.e., the distinction between "virtually no risk" and "no risk") to the exclusion of other legitimate interests, such as the interests of feedlots and cattle feeders who try to make modest livings fattening livestock. The Court's questioning evidences the Court's excessive focus on the minimal risk associated with the Final Rule:

> THE COURT: It looks like there is a risk. Now if it's a slight risk, very low, negligible, highly unlikely, there's a risk, right?
>
> MS. OLSON: Right.
>
> THE COURT: Well, I remember – let me ask you this. Do any of the USDA, the APHIS experts, opine that there are no risks, virtually no risks?
>
> MS. OLSON: Virtually no – there is virtually no risk. But zero risk, perfection, is impossible to achieve.
>
> THE COURT: I guess that's where I get confused. I haven't made the distinction between "virtually no risk" and "no risk."

> MS. OLSON: The risk here is so negligible. If we were to adopt zero risk as our standard, not only would all trade stop, I think all beef-eating would stop. If we were to adopt no risk for the standard in our lives, we wouldn't get into the car and drive to work in the morning.
>
> The goal of this rule is to stamp out the risk.
>
> There is not zero risk, but there is zero tolerance of risk. And the rule embodies risk mitigation measures, a series. As we've said in the briefs, they're interlocking, reinforcing, risk mitigation measures which taken by themselves are highly effective but taken together do create a virtually impenetrable barrier. I'm not going to say there's perfection, because there always will be imperfections, but the risk here to the public health is negligible.

Transcript of Hearing on Application for Preliminary Injunction at P. 49, L. 8 – P. 50, L.8.

The District Court's focus remained on exaggerated human health issues in issuing Preliminary Injunction. The District Court inappropriately dwelled on the difference between "low" and "zero" health risk, and did not address the significant economic interests involved in the cattle industry, including the interests of family owned feedlots in the grain producing regions which need a steady and predictable supply of light cattle to fatten. Rather, the District Court merely stated, without any evidentiary findings, that "[t]here will not be any significant harm to Defendant or any other party" in issuing the preliminary injunction. Order of Preliminary Injunction at P. 26. The District Court is wrong.

Pioneer and other feedlots and cattle feeders are dramatically harmed by the Court's inappropriate focus on "exceedingly low" human health risk. Even R-CALF concurs that concerns about human health risks of eating beef is overblown. *See* R-CALF'S Answering Brief, Case No. 05-35214, at 44 (9th Cir. March 29, 2005).

Because of the domestic cattle shortage, Pioneer and similarly situated feedlots and cattle feeders need a supply of Canadian light cattle to remain financially sound. The "balance of interests" test should have considered domestic family-farm feedlot operations and the light cattle shortage. The District Court did not consider those interests when it substituted its judgment for the Secretary of Agriculture's judgment and issued the preliminary injunction. Instead, the District Court inappropriately deferred to the special interests of Northern Plains ranchers to keep light cattle prices high. Therefore, this Court should reverse the District Court's order.

IV. CONCLUSION.

The District Court's preliminary injunction harms Pioneer and similarly situated cattle feeders. The District Court abused its discretion when it failed to consider the serious and irreparable injury to other sectors of the cattle industry and substituted its judgment for the Secretary of Agriculture's judgment. Pioneer

endorses the outcome urged by the USDA. For these reasons, this Court should reverse the District Court and dissolve the injunction.

DATED this 21st day of April, 2005.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO
FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1

I certify that: **(check appropriate options(s))**

___1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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___2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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☐ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and** is

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_X_ 4. *Amicus Briefs*

☐ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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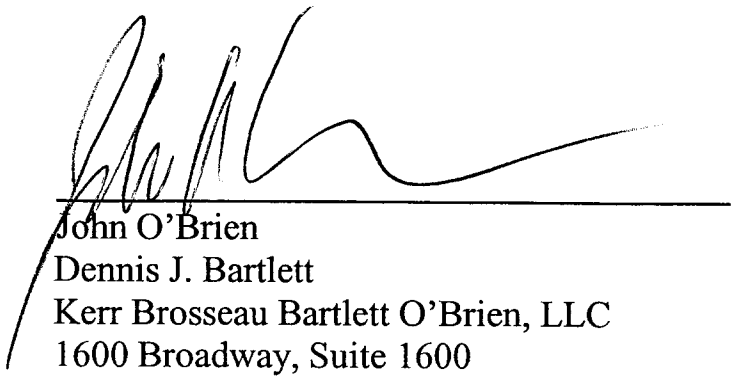
Date



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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of April, 2005, I have caused a true and accurate copy of ***AMICUS CURIAE*** **BRIEF OF PIONEER, INC. SUPPORTING REVERSAL** to be served by **Federal Express** upon:

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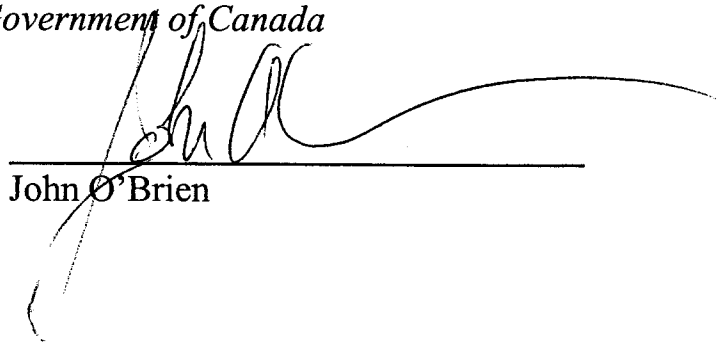

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